No. 79-5885

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DANIEL JOSEPH PORTLEY, PETITIONER

v.

LAWRENCE GROSSMAN, WARDEN, and
UNITED STATES PAROLE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS IN OPPOSTION

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This case presents, inter alia, the question whether application of the Parole Commission's parole release guidelines to petitioner (who was sentenced prior to the effective date of the guidelines) constitutes an unconstitutional ex post facto enhancement of his criminal sentence. In our initial brief we suggest (Br. 9) that this question should be decided in light of the Court's decision in United States Parole Commission et al v. Geraghty, No. 78-572, which was then pending and presented the same issue. In all other respects we submitted that the petition for a writ of certiorari should be denied.

On March 19, 1980, this Court decided Geraghty but did not reach the merits of the ex post facto claim, stating (slip. op. at 19) that "[i]t would be inappropriate * * * to reach the merits of this controversy in the present posture of the case," and adding (id. at 20)that "although the Court of Appeals commented upon the merits for the sole purpose of avoiding waste of judicial resources, it did not reach a final conclusion on the validity of the guidelines. Rather, it held only that summary judgment was improper and remanded for further factual development. Given the interlocutory posture of the case before us, we must defer decision on the merits of [Geraghty's] case until after it is determined affirmatively that a class properly can be certified." Accordingly, the Court vacated the judgment and remanded to the court of appeals for further proceedings.

Inasmuch as the court of appeals' judgment in Geraghty has been vacated, there no longer exists a conflict among the circuits concerning whether application of the parole release guidelines to prisoners sentenced prior to the guidelines' effective date violates the Ex Post Facto Clause. The courts of appeals uniformly agree that such application of the guidelines does not constitute an unconstitutional ex post facto enhancement of a criminal sentence. See Zeidman v. United States Parole Commission, 593 F.2d 806 (7th Cir. 1979); Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978); Shepard v. Taylor, 556 F.2d 648, 654 (2d Cir. 1977); Ruip v. United States, 555 F.2d 1331, 1335-1336 (6th Cir. 1977). For the reasons stated in our brief in Geraghty, we believe that this conclusion is correct. Therefore, we submit that in the absence of a conflict it is not necessary for this Court to consider the ex post facto claim asserted here.

Nor does this case involve the issue presented for review in Weaver v. Graham, No. 79-5780, cert. granted, March 17, 1980. That case presents the question whether the application of a Florida statute (reducing the good time credit prisoners may earn) to prisoners sentenced prior to its effective date violates the Ex Post Facto Clause. The statute at issue in Weaver extends a prisoner's mandatory release date. 1/ By contrast, the changes in the parole guidelines involved in this case do not affect either a prisoner's date of parole eligibility or his mandatory release date. The guidelines merely provide a framework for the Commission's exercise of its statutory discretion to grant parole to an eligible prisoner. Because this case is thus readily distinguishable from Weaver, the Court need not hold it in abeyance until that case is decided. 2/

1/ When the petitioner in Weaver entered the Florida prison system a tentative release date was set. This date, December 31, 1984, took into account 2340 days "gain time" for good behavior authorized by Section 944.27 Florida Statutes (1976). Under Section 944.27, gain time was calculated as follows: five days per month for the first and second years of the sentence, 10 days per month for the third and fourth years, and 15 days per month for each of the succeeding years.

Section 944.27 was repealed by section 944.275, effective July 1, 1978, but not implemented until January 1, 1979. Section 944.275 differs from its predecessor in that it grants gain time of three days per month instead of five for the first two years, six days per month instead of 10 for the third and fourth years, and nine days per month instead of 15 for succeeding years. In all other respects, Section 944.275 is substantially identical to the superseded section.

Once the new law went into effect, Weaver's projected release date was recomputed -- under the terms of Section 944.27 for the part of his sentence served prior to January 1, 1979, and under Section 944.275 insofar as his sentence falls after that date. Accordingly, Weaver's new projected release date (including 165 days forfeited because of disciplinary infractions) is February 2, 1987.

2/ We also note that petitioner is scheduled to be released on parole on September 19, 1980. Therefore, his ex post facto claim will be moot by the time Weaver is decided.

CONCLUSION

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted.

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